Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

TIDMORE OIL COMPANY, INC.,
Petitioner,
v.
BP OIL COMPANY/GULF PRODUCTS
DIVISION OF BP OIL COMPANY
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

W. DENNIS SUMMERS
Counsel of Record

EZRA B. JONES, III
SUMMERS & JONES, P.C.
3060 Peachtree Road, N.W.
Suite 1070
Atlanta, Georgia 30305
(404) 233-7274

Tower Printing Company, 2 Peachtree St., Atlanta, Georgia 30383 (404) 659-4080

QUESTIONS PRESENTED

1. Whether a legally enforceable distribution agreement between a major oil company and its independent jobber creates a "contract in restraint of trade" under Section 1 of the Sherman Act, when the oil company competes directly with the distributor and uses the provisions of the contract to foreclose the distributor from an important market in which they both compete?

2. Whether summary judgment is appropriate to deny jury consideration of a territorial restraint when the "contract" element of Section 1 is satisfied by an agreement between the parties and a coercive use of the agreement by the Defendant?

3. Whether the Eleventh Circuit erred by extending the refusal to deal immunity of *United States v. Colgate and Co.* to vertical territorial allocations?

LIST OF PARTIES

The Petitioner herein is: Tidmore Oil Company, Inc.

The Respondent herein is: BP Oil/Gulf Products Division.

Tidmore Oil Company, Inc. has no parent company and no subsidiaries.

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v.
BP OIL COMPANY/GULF PRODUCTS
DIVISION OF BP OIL COMPANY
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in this action on June 7, 1991, which was authored by Judge Robert F. Peckham, Senior District Judge for the Northern District of California, sitting by designation.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 932 F.2d 1384 and appears in Appendix A hereto. The opinion of the District Court granting Defendant's Motion for Summary Judgment is unreported and appears in Appendix B hereto.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal....

STATEMENT OF THE CASE

A. *Proceedings Below.*

The Petitioner, Tidmore Oil Company ("Tidmore"), brought this action against its supplier, BP Oil Company ("BP"), alleging vertical and horizontal restraints of trade, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1. Tidmore contends that BP employed certain provisions of its wholesale distribution agreement with Tidmore ("Branded Jobber Agreement" or "Agreement") to eliminate competition by Tidmore in an important portion of the Birmingham, Alabama retail gasoline market. By its actions, BP has become the dominant retail marketer in the relevant market, thereby reducing intrabrand competition and diminishing customer alternatives.

Despite the uncontroverted opinion of Tidmore's expert, who concluded that BP had reduced intrabrand competition, the district court granted summary judgment, finding no "contract, combination...or conspiracy" under Section 1.[1] The court concluded that BP acted unilaterally

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[1] Among the uncontroverted conclusions of the expert are the following: BP has a dominant market share of 37% of the affected market, whereas Tidmore has only three percent of the market, and the next largest competitor after BP possesses only a 10% market share.

and did not participate in a conspiracy. On appeal, Tidmore argued that the Branded Jobber Agreement, and BP's coercive use of the Agreement to effect an illegal allocation of the retail market, satisfied the "contract" element of Section 1.

The Eleventh Circuit recognized that "[c]ourts have found the 'agreement' element to be satisfied where a manufacturer uses the threat of termination (1) to coerce retailers to adhere to stated retail prices...(2) to coerce compliance with a scheme of exclusive territories...(3) to coerce the retailer to refrain from selling competitor's products and to comply with certain trying arrangements...and (4) to obtain the buyer's acquiescence in some other anti-competitive provision..." 932 F.2d 1388 (citations omitted). Nevertheless, the court concluded that BP's market allocations were not actionable because BP imposed the restraints unilaterally and "sought nothing in return" from Tidmore. 932 F.2d 1388-89. As a result, Tidmore's Section 1 claim received only summary review, since the district court never even considered the reasonableness of the restraint under the rule of reason analysis which is applied in similar cases.

Because of BP's market dominance, it has the ability to charge higher prices than its competitors in the affected market and in fact does. BP's market share dominance in the affected area has resulted in reducing both intrabrand and interbrand competition. Tidmore is an effective marketer of gasoline and convenience store merchandise. Tidmore generally prices its gasoline products one or two cents below the retail prices charged by BP and normally provides a wider variety of convenience store merchandise to its customers than BP's company-operated retail facilities. Ailvine Affidavit, Appendix C.

B. *Relationship of the Parties.*

BP is a major oil company that refines petroleum products from crude oil and sells such products, including gasoline, through a vast two-tier distribution network. In 1985, BP acquired certain assets from Gulf Oil Company, including the right to use the Gulf trademark in Alabama. BP sells gasoline to customers such as Tidmore, and such customers are independent businesses known as jobbers or wholesalers. In addition to the wholesale method of distribution, BP also sells gasoline at the retail level to the consuming public through directly supplied dealers and through BP's own company-operated retail facilities. Thus, BP is not only Tidmore's supplier, it is also in direct competition with Tidmore on the retail level of trade.

As a jobber, Tidmore distributes gasoline through its own retail outlets and through retail outlets operated by its customers. Tidmore is the largest Gulf/BP jobber in the State of Alabama and distributes Gulf/BP branded gasoline to approximately 40 to 50 locations in 9 counties and retails gasoline directly through 15 or 16 retail outlets. Tidmore's jobbership is governed by a Branded Jobber Agreement, which provides that BP will supply it with BP brand gasoline. BP may terminate Tidmore's jobbership if Tidmore violates certain terms of the agreement which, *inter alia*, prohibit Tidmore from selling other brands of gasoline under the Gulf/BP sign or displaying the Gulf/BP sign at unauthorized locations.

For more than 24 years, Tidmore has marketed Gulf (now BP) products through its own retail facilities located in Shelby County, Alabama including three locations in Northern Shelby County. Formerly a rural county, Shelby

County has experienced explosive development and now forms the southernmost county of metropolitan Birmingham. For years, Gulf branded gasoline was sold only from Tidmore-supplied and operated locations in Shelby County. In recent years, however, as the population of the County has grown, BP has begun to operate company-operated outlets in the area.

Prior to 1986, Tidmore had been allowed to expand and add additional retail outlets throughout Shelby County and the remainder of Tidmore's trade area. During Tidmore's two decade relationship with Gulf, it obtained Gulf's approval to use the Gulf brand and logo each time Tidmore added additional retail locations, as required by Tidmore's agreements with Gulf, and later with BP. Similarly, the 1987 Branded Jobber Agreement required that Tidmore obtain BP's approval for the use of the Gulf brand at each outlet. Tidmore's retail outlets have always met or exceeded the Gulf and BP retail image and sales standards so that prior to 1986 Tidmore's expansion plans had always been met with approval. In Tidmore's many years of gasoline marketing neither Gulf nor BP has ever exercised the right to debrand any of Tidmore's locations.

In November 1986, BP rejected Tidmore's request to locate a retail facility on U.S. Highway 280 in Northern Shelby County. Tidmore believed that the outlet would meet all of the stated image requirements under the Branded Jobber Agreement. Joe Tidmore asked his BP representative why he could not locate the facility as requested and was informed that it was apparently too close to a company-operated station. During discovery, BP offered four additional reasons for refusing the site, but subsequent depositions and BP's own actions strongly

indicate that these factors were pretextual. In 1987, Tidmore learned that BP intended to build its own company-operated retail facility on Highway 280 which was even closer to the company-owned facility which had frustrated Tidmore's expansion plans. Shortly thereafter Tidmore discovered that BP intended to develop two additional company-operated outlets in Northern Shelby County.

In early 1988, BP informed Tidmore of its decision to divide and allocate Tidmore's marketing area so that the metro Birmingham market would become the exclusive domain of BP's retail division. Fearing that BP had encroached upon its traditional market area, Tidmore requested, and was granted, a meeting with BP representatives in February 1988 to discuss BP's retail marketing activities in Shelby County. During that meeting Tidmore asked BP representatives numerous questions concerning his ability to market in Northern Shelby County. After obtaining the answers to Tidmore's questions from the head of jobber sales, the BP representatives met with Tidmore again on March 15, 1988 and informed Tidmore that BP would not approve or reconsider any of Tidmore's location requests in a specific forbidden area, thereby excluding Tidmore from marketing in Northern Shelby County. The BP representatives then drew these boundaries on a map to delineate the area foreclosed to Tidmore. BP's representatives further stated that Tidmore could not market anywhere in the metropolitan area which BP defined to include Northern Shelby County.

C. *The Branded Jobber Agreement.*

The Branded Jobber Agreement is a printed document prepared by BP and used to control BP's relationship with hundreds of jobbers throughout the United States. By virtue of BP's control over use of its brand, and its right to determine the geographic density of branded outlets, BP is capable of reducing or even eliminating competition between successful jobbers, like Tidmore, and BP's company-operated outlets. Any jobber who fails to abide by the terms of the Agreement is subject to termination. In areas such as Northern Shelby County, where the Gulf/BP brand has substantial market presence, BP's exclusion of competitive jobbers from the market can and does injure competition. The issues raised herein are of national scope because all major oil companies employ similar agreements with equally restrictive terms, which are often abused in contravention of the policies of the Sherman Act.

D. *National Importance of the Issue.*

As a general rule, the agreements between refiners, such as BP, and their jobbers, do not specify particular territories in which the jobbers may market the branded products of their supplier. Rather, refiners use a number of contractual devices to control the use of their trademarks, and the sale of their branded products. For example, every major oil company protects its brand name through trademarks, tradenames, logos and advertising material. Typically, a jobber agreement will provide that the jobber may not use the brand name or trademark of its supplier without prior approval. The jobber may generally obtain such approval only by making a written request for

review of a particular retail site. Such trademark and site approval provisions are strictly enforced, and violation of the supplier's trademark rights will result in termination of the jobber's supply agreement.

In addition to provisions governing trademark rights, the jobber supply agreements of the major oil companies often contain location clauses or density provisions which give the refiner unfettered discretion over sign placement and site approval. Generally, the trademark provisions and location clauses contained in a wholesale agreement are enforceable as a matter of contract law. Nonetheless, although there are business justifications for the use of contract terms governing trademarks and retail site approval, such contract terms are frequently abused by the oil companies. In those instances where the gasoline supplier is also a retailer, the supplier may find itself in direct competition with its own customers. Retail gasoline marketing is fiercely competitive, since retail customers will alter their buying habits to save one or two cents per gallon of gasoline purchased. Due to the highly competitive nature of the retail gasoline business, suppliers such as BP often succumb to the temptation to use their extraordinary contractual powers to gain a competitive advantage in the marketplace.

In this case, Tidmore is a successful gasoline retailer located in a desirable and growing metropolitan market. BP's intentions to market in Tidmore's traditional territory are undisputed, and BP has successfully established a dominant market presence in the relevant market. (Allvine Affidavit, Appendix C, ¶ 10). Thus, BP has used its vast resources and superior bargaining power first to obtain favorable contractual terms from Tidmore and its

other jobbers. Then, using the power granted in its Agreement, BP elected to eliminate Tidmore as a competitor from the metro area targeted as one of its desired areas of growth. Tidmore believes that the damage caused by BP, in the context of a vertically imposed market allocation, is well within the protection of Section 1, and at the very least, entitles Tidmore to a jury trial on the issue of the reasonableness of BP's actions.

REASONS FOR ALLOWING THE WRIT

I. There Is A Clear Conflict Among The Judicial Circuits As To The Ability Of A Distributor To Challenge Non-price Vertical Restraints Which Are Forced Upon The Distributor By Contract.

A. *Introduction.*

The ruling of the Eleventh Circuit should be reviewed by this Court because it conflicts with decisions of this Court and decisions of the Second, Fourth, Fifth, Eighth, Ninth and Tenth Circuits, all of which have granted Sherman Act jurisdiction to claimants who base their claims on dealer or licensing agreements. Tidmore's Section 1 claim should have gone to a jury. By allowing summary disposition of Tidmore's claim on the threshold issue of Section 1 jurisdiction, the Eleventh Circuit ignored the controlling precedent of this Court and a majority of the judicial circuits. If the Eleventh Circuit's opinion is allowed to stand, it will severely undermine antitrust enforcement by creating a new, artificial barrier to suits brought by claimants, such as Tidmore, who are victims of supplier-imposed restraints. Moreover, the major oil companies will use this loophole in antitrust

coverage to supplement their arsenal of legal weapons used for market control.

B. *The Plain Language Of Section 1 Allows Judicial Review Of Vertical Restraints Imposed By Contract, Even If The Plaintiff Consents Only To Contract Terms And Opposes The Illegal Conduct Of The Party Abusing Its Contractual Powers.*

The Eleventh Circuit erroneously held that a contract between two parties at different levels of the market structure is not an "agreement" for Section 1 purposes, absent an independent showing of conspiracy. To satisfy the contract element of Section 1, a plaintiff in the Eleventh Circuit will be required by this decision to show more than a restraint resulting from a contract between itself and the defendant. The court requires that the plaintiff show participation in the illegal activity which it challenges. Where, as here, the restraint is vertically imposed over the objection of the plaintiff, this requirement is an impossible burden which effectively converts every vertical Section 1 claim to a conspiracy case. If the decision of the Court of Appeals is allowed to stand, it will render the concept of a "contract in restraint of trade" a nullity.

The terms "contract, combination...or conspiracy" in Section 1 are not synonymous, but instead, share the common element of concerted action between or among a plurality of actors.[2] Traditionally, plaintiffs have shown

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[2] A contract refers to a binding agreement. *United States v. American Linen Supply Co.*, 141 F. Supp. 105 (N.D. Ill. 1956). A combination involves an association of two or more persons for the attainment of some common end. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). A conspiracy involves a plurality of actors who either act

these elements by pointing to a contract or conspiracy between the parties.[3] In cases involving parties at the same level of distribution, *i.e.*, horizontal claims, concerted action is likely shown through evidence of conspiracy among competitors.[4] By contrast, vertical disputes between parties at different levels of the distribution chain usually are based upon contractual relationships found in supplier, dealer, license, and franchise agreements.

Tidmore does not allege that BP and Tidmore engaged in a conspiracy with each other or with any other person. Instead, Tidmore relies on the Branded Jobber Agreement, and BP's actions thereunder, to show the concerted action required for Section 1 jurisdiction. Even though Tidmore merely acquiesced, and did not actually agree with BP's allocation of the affected market, the Eleventh Circuit should have reversed the district court's grant of summary judgment in favor of BP. The concerted action needed under Section 1 occurred when BP offered and Tidmore accepted the Branded Jobber Agreement and BP abused its powers thereunder. The Eleventh Circuit erred in ruling that some participation by Tidmore in the challenged activity was a prerequisite to Section 1

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unlawfully or seek to achieve an unlawful goal. *United States v. General Motors Corp.*, 384 U.S. 127 (1966).

[3] See J. Baker, *Combination and Conspirators, Is There a Difference?*, 14 Antitrust Bull. 71 (1969). Other commentators believe that Section 1 jurisdiction can be shown strictly from a "combination of actors separate from a conspiracy"; *Panel Discussion of New Theories of Price Conspiracy*, 24 ABA Antitrust Section Rep. 76 (1984), Note, *Combinations in Restraint of Trade: A New Approach to Section One of the Sherman Act*, 1966 Utah L. Rev. 75.

[4] *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

jurisdiction. Such a result effectively eliminates the "contract" element of Section 1 as a basis for jurisdiction and creates a new summary judgment barrier to victims of vertical restraints.

C. *The Eleventh Circuit's Ruling Is Contrary To The Majority Of Circuits, Which Allow Section 1 Challenges To Vertically Imposed Restraints.*

A majority of the circuit courts has consistently allowed Section 1 claims based on restrictions contained in distributor or dealer agreements without any discussion of a jurisdictional issue which might justify summary disposition under Fed. R. Civ. P. 56.[5] Moreover, when the Fifth and Eighth Circuits directly addressed the jurisdictional issue raised here, they concluded that a contractual restriction placed upon a retailer by the supplier satisfied the jurisdictional requirements of Section 1. *Abadir and Co. v. First Mississippi Corp.*, 651 F.2d 422 (5th Cir. 1981); *Arnott v. American Oil Co.*, 609 F.2d 873 (8th Cir. 1979). *See also Allen Organ v. North Am. Rockwell Corp.*, 363 F. Supp. 1177 (E.D. Pa. 1973), where the district court held that it was proper for the plaintiff to rely on the contract between itself and the manufacturer to establish the requisite plurality of actors for Section 1 violations. In *Abadir*, the Fifth Circuit ruled that a wholesaler's oral agreement to abide by its supplier's territorial allocation satisfied the contract requirement of

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[5] See *Murrow Furniture Galleries v. Thomasville Furniture Indus.*, 889 F.2d 524 (4th Cir. 1989); *Murphy v. Business Cards Tomorrow, Inc.*, 854 F.2d 1202 (9th Cir. 1988); *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311 (8th Cir. 1986); *Dart Industries v. Plunkett Co.*, 704 F.2d 496 (10th Cir. 1983); *Medelovitz v. Adolf Coors Co.*, 693 F.2d 570 (5th Cir. 1982); *Eiberger v. Sony Corp. of Am.*, 622 F.2d 1068 (2d Cir. 1980).

Section 1.[6] Similarly in *Arnott*, the Eighth Circuit approved Section 1 review of a gasoline retailer's claim when the retailer orally agreed to abide by its supplier's price directives.

Like the plaintiff in *Abadir*, Tidmore acquiesced in the market allocating directive of his supplier. This Court recognized in *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134 (1968), that in order to contract with a supplier, distributors and dealers sometimes are forced to accept vertical restraints that are detrimental to their interests. The acquiescence to such provisions should not bar suit by a purchaser when the supplier uses the restraint to effect an anticompetitive scheme.[7] The decision of the Eleventh Circuit, however, does just that by denying a Section 1 claim based on a vertical restraint that was used by BP to violate the antitrust laws. Under Fed. R. Civ. P. 56, summary judgment was improper, and Tidmore's case should have gone to the jury for consideration.

To support its proposition that a contract between two parties does not in itself confer § 1 jurisdiction upon one of the parties, the Eleventh Circuit relied heavily on *Barnosky Oils, Inc. v. Union Oil Company of California*, 665 F.2d 74 (6th Cir. 1981). In *Barnosky*, the plaintiff, an independent gasoline wholesaler who resold gasoline to in-

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[6] "On re-direct and re-cross examination, Dr. Abadir insisted that he had acquiesced in [Defendant's] requirement that he resell the urea for consumption in Asia...That testimony was sufficient for the jury to find that there was a market dividing agreement between first Mississippi and Abadir." (citation omitted). 651 F.2d at 424.

[7] *Id.* at 139.

dependently owned retail stations, claimed that Union Oil's act of controlling sign placement created illegal customer and territorial allocations. In rejecting the retailer's theory of contractual restraint of trade, the Sixth Circuit held that the contract was irrelevant to the issue of concerted action because Union unilaterally made the sign placement decisions.

The Sixth Circuit, however, erred in ignoring the contractual agreement that allowed Union to act in a way that arguably restrained trade. Regardless of whether the Sixth Circuit was correct in its ruling, Tidmore believes that the Eleventh Circuit erred in relying on *Barnosky* to grant Defendant's Summary Judgment Motion because *Barnosky* merely involved denial of a form of advertising (a tall sign pole), whereas BP's market allocation is significantly more anticompetitive and constitutes a serious violation of recognized antitrust principles. *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894 (5th Cir. 1973). Furthermore, the Fifth Circuit's decision in *Response of Carolina, Inc. v. Leasco Response, Inc.*, 573 F.2d 1307 (5th Cir. 1976), should have controlled Petitioner's situation. In *Response of Carolina*, the Fifth Circuit stated "where a territorial or customer 'restriction' is created by contract, the Sherman Act's Section 1 jurisdictional requirement is met." *Id.* at 1318. The confusion created by the differing views in *Hobart*, *Response of Carolina* and *Tidmore* require review.

If the Eleventh Circuit is allowed to extend *Barnosky* to claims of vertical territorial allocation, retailers and wholesalers will almost never be able to challenge the reasonableness of a contract provision vertically imposed upon them by their supplies. This result would not only

eliminate independent jobbers from the market place, but also harm consumers in the form of higher prices. The split of authority brought on by the Eleventh Circuit's contrary opinion is worthy of this Court's review.

D. *Supreme Court Precedent Indicates That The Jurisdictional Element Of Section One Is Satisfied By A Retailer-Supplier Agreement.*

The Eleventh Circuit's decision conflicts with this Court's allowance of claims resulting from a supplier's actions taken pursuant to a vertical restriction within a supply contract. Even though the Supreme Court can unilaterally raise subject matter jurisdictional issues,[8] Section 1 jurisdiction has not been questioned in significant cases involving contractual vertical restraints. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Perma Life Mufflers, supra; Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1964); *White Motor Co. v. United States*, 372 U.S. 253 (1963).

In *White Motor*, this Court's reversal of summary judgment stressed the need for a jury to analyze the impact that vertical restraints have on competition: "It is only through such an analysis that the decision whether restraints are illegal or acceptable business practices can be made." *Id.* at 703; *see also, Hobart, supra.*

Similarly, in *Perma Life Mufflers*, this Court reversed and remanded the case for analysis of the market effect of the restraint, ruling that a franchise agreement provided the requisite degree of concerted action needed in a

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[8] Fed. R. Civ. P. 12(H)(3).

vertical claim. *Perma Life Mufflers*, at 142. Pursuant to *White Motor* and *Perma Life Mufflers*, the Eleventh Circuit should have considered the illegality of BP's actions under the rule of reason, rather than summarily dismissing the claim for want of concerted action.

More recently, this Court analyzed vertical non-price restraints in *GTE Sylvania, supra.* This Court reversed the district court's grant of summary judgment for the defendant, remanding the case to allow the trial court to determine the "reasonableness" of the restraint.[9] The issue of Section 1 jurisdiction was never questioned in either *White Motor* or *GTE Sylvania*. In fact, the Court noted in *GTE Sylvania* that the defendant conceded that the actions taken pursuant to the location restrictions involved "understandings" or "agreements" with the franchisees. *GTE Sylvania* at 2252 n.8.

Although *White Motor* and *GTE Sylvania* applied different standards of proof in vertical Section 1 claims, since 1963 this Court has condemned the use of vertical restraints because of their anticompetitive nature. Likewise, circuit court decisions both before and after *GTE Sylvania* have found territorial allocations to be illegal. *Response of Carolina, supra; Noble v. McClatchy Newspapers*, 533 F.2d 1081 (9th Cir. 1975); *Reed Brothers, Inc. v. Monsanto Co.*, 525 F.2d 486 (8th Cir. 1975); *Pitchford*

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[9] In GTE *Sylvania*, however, the Court left open the possibility that there were some vertical restraints that were "so egregious" that *per se* treatment would be applied. 433 U.S. 58. Tidmore argued before the Eleventh Circuit that the *per se* rule is applicable in the instant case. For purposes of this appeal, Tidmore believes that the *per se* rule is appropriate to resolve this matter, but will not discuss the issue since the Eleventh Circuit did not address the standard to be applied.

v. Pepi, Inc., 531 F.2d 92 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976); *Arnott v. American Oil Corp., supra.*

Most of the circuit courts have concluded that where a territorial restraint is created by an express or implied contract, review under Section 1 is available. *Response of Carolina*, at 1318, *Noble*, at 1089-90, *Reed Brothers*, at 495, *Pepi*, at 101. To the extent that these cases analyze the jurisdictional element of whether there is "contract, combination or conspiracy," these decisions have not been superseded by *GTE Sylvania*.

Like the plaintiffs in *White Motor* and *GTE Sylvania*, Tidmore is challenging the actions of its supplier taken pursuant to a contract provision. BP's density provision, offered by BP as a justification for its market allocation,[10] also parallels the restrictions contained in White Motor's dealer agreements and Sylvania's franchising agreement. These restrictions involve the necessary contractual agreements between the manufacturer and the retailer to confer Section 1 jurisdiction upon Tidmore. It was an error for the Eleventh Circuit to hold otherwise.

If the decision below is allowed to stand, it will be impossible for a retailer to object to a vertical non-price restriction unless a separate conspiracy can be proven. Such a requirement eviscerates the Sherman Act by eliminating the contract element of Section 1 and will allow manufacturers an opportunity to place restrictions in retail agreements without fear of antitrust prosecution.

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[10] BP never relied on the density provision in its dealings with Tidmore. BP first offered this provision to excuse its actions long after Tidmore filed the instant case.

II. If Allowed To Stand, The Decision Of The Eleventh Circuit Will Foreclose Vertical Restraint Claims Under Section 1, Unless An Independent Showing Of Conspiracy Is Made.

A. *Refusal To Deal Analysis Should Not Be Extended To Vertical Claims Based On The "Contract" Element Of Section 1.*

The Eleventh Circuit held that the total exclusion of Tidmore from the metro Birmingham market, including his traditional market of Northern Shelby County, was not subject to review under Section 1. Rather, the court characterized BP's actions as a permissible unilateral refusal to deal. In *United States v. Colgate and Co.*, 250 U.S. 300 (1919), this Court held that certain unilateral refusals to deal were immune from Section 1 liability:

> In the *absence of any purpose to create or maintain a monopoly*, the [Sherman] Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.

Id. at 307 (emphasis added).

This Court later observed in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), that *Colgate* confers only a limited dispensation from the prohibition against restraints of trade found in the Sherman Act. The *Colgate* doctrine does not legitimize all unilateral refusals to deal; only "simple" unilateral refusals to deal are per-

missible under *Colgate*. (A simple unilateral refusal to deal occurs when a manufacturer refuses to sell to a dealer for independent business reasons and such refusal does not further an anticompetitive scheme or effect a restraint of trade.) Under *Colgate*, a manufacturer is subject to Sherman Act liability if its refusal to deal is coupled with monopolistic intent or effects a restraint of trade.

By characterizing this case as a unilateral refusal to deal case, the Eleventh Circuit incorrectly focused on the unilateral nature of BP's unlawful territorial division. Yet, the court failed to recognize the economic and practical reality that all vertical restraints are unilateral because they are imposed by a dominant manufacturer on a weaker distributor or dealer as a contractual pre-condition to a franchise or distributorship. Once the parties consent to contract terms vesting the manufacturer with broad authority over price, location of outlets and the use of trademarks, vertical restraints can result when the manufacturer abuses the authority that can be exercised unilaterally for the manufacturer's benefit. See *Perma Life Mufflers, supra; Simpson, supra; Hobart, supra.*

B. *The Eleventh Circuit Erroneously Extended The Colgate Doctrine of Immunity Beyond Simple Refusals To Deal.*

Even under *Colgate*, BP's actions constitute an actionable refusal to deal because of their anti-competitive effect on trade.[11] Therefore, the Eleventh Circuit's charac-

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[11] For purposes of its analysis, the Eleventh Circuit assumed that BP's refusal to authorize new sites limited competition in Gulf-branded petroleum products. Also, the unrebutted opinion of Plaintiffs' expert

terization of BP's actions as a simple unilateral refusal to deal is incorrect, and summary judgment was improper. Tidmore presented evidence that BP's exclusion of Tidmore from the metro Birmingham market has reduced intrabrand competition between Tidmore and BP, (Allvine Affidavit, Appendix C, ¶ 15). BP's purported refusal to deal presents a jury question on the reasonableness of the restraint, since the entire purpose of the refusal was to eliminate competition.

The Eleventh Circuit's holding was also error in light of this Court's subsequent decisions restricting *Colgate*. *See Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Perma Life Mufflers, supra; Simpson, supra; Parke, Davis, supra; United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920). In each of these subsequent cases, this Court limited the scope of the immunity available for unilateral refusals to deal. In view of these cases, a recognized treatise indicates that customer selection is not absolutely immune under Section 1, and that the intent and purpose of the challenged refusal is decisive in determining the legality of the action. 2 Kinter, *Federal Antitrust Law*, § 10.21-22 (1980).

Under this Court's post-*Colgate* decisions, a unilateral refusal to deal is actionable if it is made under authority of an agreement which restrains trade. In *Parke, Davis, supra*, this Court held that a refusal to deal which was used to police a price maintenance scheme was actionable. Likewise in *Perma Life Mufflers, supra*, this Court held that a defendant who had terminated a franchisee for

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concludes that BP's actions have reduced intrabrand competition in the relevant market and have reduced consumer alternatives.

violating several restrictive provisions of a franchise agreement was subject to liability under Section 1 of the Sherman Act.[12] The franchisor's use of the restrictive provisions created an actionable restraint of trade, even though enforced unilaterally by the franchisor.

Apparently, the Eleventh Circuit considered BP's actions to be unilateral (and immune from Section 1 scrutiny) because the Branded Jobber Agreement allowed BP to determine the geographic density of Gulf branded locations. The court's analysis was incorrect for two reasons. First, the court focused only on certain retail site denials and ignored evidence that BP excluded Tidmore from the entire metro market. During the 1988 meetings, BP representatives drew a map of the territory encompassing metro Birmingham and told Tidmore that it was excluded from marketing in that area. Such market allocations are forbidden by decisions applying Section 1 in the vertical and horizontal contexts. *GTE Sylvania, supra; Hobart, supra*. Second, the Eleventh Circuit looked only at the authority given to BP in the density and trademark provisions, while ignoring the adverse effect on competition which resulted from BP's anticompetitive use of these provisions. BP used the Branded Jobber

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[12] In *Perma Life Mufflers, supra*, only one of the plaintiffs had its franchise agreement terminated for violating the franchise agreement. The other plaintiff dealers *canceled* their agreements. Thus, *Perma Life Mufflers* is not just a refusal to deal case. Under the Eleventh Circuit's rationale, it is hard to see how any of the plaintiffs in that case could have articulated a cause of action under Section 1.

Agreement to restrain trade by allocating customers and territories between Tidmore and BP's retail division.[13]

The correct analysis of BP's actions would be similar to this Court's review of *Simpson*. 2 Kinter, *Federal Antitrust Law*, § 10.22 (1980). ("One commentator regards *Simpson* as a further encroachment on *Colgate* in that agreements solely between the two involved parties can be used to satisfy the threshold Section 1 conspiracy requirement," citing Comment, *Unilateral Refusal to Deal: King Colgate Is Dead*, 30 Ohio State L.J. 537 (1969)). In *Simpson*, Union Oil could set the price of gasoline under a consignment agreement.[14] Simpson adhered to Union's prices for some time, and when he later refused to comply with certain price demands, Union terminated his contract. The actual determination of the price was unilateral as was Simpson's termination for non-compliance. The imposition of the price setting provision in the consignment agreement, however, was a mutual agreement reached when Simpson signed Union's standard dealer agreement. Any unilateral action taken by Union Oil was the fruit of the consignment agreement which was determined by this Court to be a contract in restraint of trade:

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[13] Although the relationship between the parties is vertical, the restraint worked a horizontal territorial allocation between Tidmore and BP.

[14] Prior to this Court's review of Union's agreement and the coercive use thereof, consignment arrangements were immune from Section 1 review because no *sale* of the products occurs between a consignor and consignee. *United States v. General Elec. Co.*, 272 U.S. 276 (1926). See also, *GTE Sylvania, supra*.

> To allow Union Oil to achieve price fixing in this vast distribution system through this "consignment" device would be to make legality for antitrust purposes turn on clever draftsmanship. We refuse to let a matter so vital to a competitive system rest on such easy manipulation.

377 U.S. 13, at 24; *Hobart, supra* at 900 ("Hobart could refuse to deal with Gilliland, but that right did not give Hobart immunity so that it could use an illegal territorial restraint....")

Likewise, BP's exclusion of Tidmore from the metro Birmingham market was taken under color of the Branded Jobber Agreement. Simpson acquiesced to a contract provision which allowed Union Oil to set the price, whereas Tidmore acquiesced to a contract which allowed BP to approve the use of the Gulf brand. Both BP's and Union Oil's actions were unilateral (price-setting and market allocation), but they were taken pursuant to an agreement which purportedly authorized the unilateral but illegal action. The Court of Appeals should have examined the Branded Jobber Agreement and BP's actions thereunder just as this Court examined the coercive use of the consignment agreement in *Simpson* instead of focusing on the unilateral acts taken to restrain trade. Applying *Simpson* here, summary judgment for BP was improper because the facts in *Simpson* are virtually identical to those present here. "If the arrangement or combination is put together through the coercive tactics of the seller alone, this is sufficient." *Osborn v. Sinclair Refining Co.*, 324 F.2d 566, 573, 574 n.13 (4th Cir. 1963).

Tidmore relied on *Simpson* and similar cases to demonstrate that the Branded Jobber Agreement, and BP's use of it, were sufficient to establish the contract, combination or conspiracy element for Section 1 jurisdiction. *Parke, Davis, supra, Albrecht, supra, Perma Life Mufflers, supra; Graphic Products Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560 (11th Cir. 1983), and *Eiberger v. Sony Corp. of Am., supra*. The Eleventh Circuit, however, distinguished these cases on the ground that BP imposed territorial restraints upon Tidmore but "sought nothing in return". As discussed below, this conclusion is (1) factually incorrect; and (2) irrelevant under precedent of this Court and a majority of the circuits.

1. The Holding Below Is Factually Incorrect.

BP sought, and obtained, Tidmore's compliance with its territorial restraint. Despite the Eleventh Circuit's conclusion that BP "sought nothing in return" from Tidmore, BP got exactly what it wanted — Tidmore's compliance with the territorial restraint.[15] Following the 1986 site denial, Tidmore abandoned plans to build a Gulf branded outlet on the site. Likewise, Tidmore has not attempted to use the Gulf (or BP) sign or logo within the territory acquired by BP (metro Birmingham), even though BP had never previously rejected a Tidmore request for sign approval in the 22 years prior to imposition of the 1988 territorial restriction.

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[15] In *Business Electronics v. Sharp Electronics*, 485 U.S. 717 (1987), this Court observed that the term restraint of trade refers to particular economic consequences and not to particular agreements. Thus, the consequences of BP's actions are more important than the pretextual excuses offered for them.

BP has taken full advantage of Tidmore's compliance with its demands, building new locations in Tidmore's traditional territory, thereby reducing intrabrand competition. In addition, Tidmore continues to buy substantial volumes of BP's gasoline and other petroleum products for Tidmore's distribution network. In fact, Tidmore is still one of BP's largest Southeastern customers, although its growth has been inhibited by BP's decision to prevent Tidmore from opening new locations in the metro Birmingham area. In the 1988 meetings with Tidmore, BP demanded compliance with its territorial restrictions, and Tidmore changed its business strategy to comply with these demands. Thus, the Eleventh Circuit's conclusion that BP got nothing in return from Tidmore is incorrect.

2. *In Vertical Restraint Cases, A Mutually Binding Contract Satisfies The Requirements Of Section 1, And No Additional Showing Of Combination Or Conspiracy Between The Parties Is Required.*

The Eleventh Circuit committed its most egregious error when it concluded that Tidmore's claim was distinguishable from that of the plaintiffs in *Simpson* and *Perma Life Mufflers* because the refusal to deal lacked mutuality. Even though Tidmore's claim is based on the contract element of Section 1, the court searched for a conspiracy and, finding none, affirmed summary judgment in favor of BP. According to the court, BP denied the site request and "sought nothing in return." 923 F.2d 1389. In *Simpson* and *Perma Life Mufflers*, however, the franchisors asked for nothing in return, other than continued adherence to a franchise agreement which contained a provision violative of the Sherman Act. In both of those cases and in the instant action, the

plaintiffs entered into franchise agreements which placed certain vertical restrictions upon them. The benefit obtained by Union Oil, Midas Muffler and BP was the expansion of their distribution network on their terms. As this Court stated in *Perma Life Mufflers:*

> [T]he franchisees' participation was not voluntary in any meaningful sense. They sought the franchise enthusiastically but they did not actively seek each and every clause of the agreement...[they] apparently accepted many of these restraints solely because their acquiescence was necessary to obtain an otherwise attractive business opportunity.

Perma Life Mufflers, supra at 139. In each case, the franchisor was vested, via a restrictive contract provision, with authority over competitive marketing decisions. In addition, the franchisors benefitted from the business relationship, which in this case continues even today. These benefits provided a sufficient basis to satisfy the "agreement" element of Section 1.

This understanding is supported by Professor Areeda's treatise which the Eleventh Circuit cited improperly and misunderstood. Areeda explains that in a vertical relationship the mutuality requirement, or *quid pro quo,* is fulfilled by the continuing business relationship:

> The quid may be thought peculiar in the usual vertical case — namely that a customer merely continues to purchase or a supplier merely continues to supply. For example, a dealer promises to charge a specified resale price in return for the manufacturer's continuing to sell; or a manufacturer promises not to supply

> another in return for the customer's continuing to purchase. *But this peculiarity presents no obstacle to treating the restraining promises as a conspiracy.*

6 P. Areeda, *Antitrust Law*, § 1402(b)(4) (1986) (emphasis supplied). Thus, any mutuality required by Section 1, apart from the contract itself, was established by Tidmore's promise to buy gasoline and adhere to the Branded Jobber Agreement, and by BP's promise to sell branded gasoline in furtherance of the continuing business relationship.

Just as in *Perma Life Mufflers*, Tidmore was forced to accept contract conditions which allowed BP to allocate markets between Tidmore and BP's retail division. In fact, the practice attacked by Tidmore is even more anti-competitive than the practices challenged by the plaintiffs in *Perma Life Mufflers* because the *Perma Life Mufflers* provisions effected market allocations in a purely vertical fashion, *i.e.*, the franchisor and franchisee were not competitors with each other. Here, while the contractual relationship between Tidmore and BP is vertical, the economic effect of the market allocation is horizontal because BP is also Tidmore's competitor, and the restraint prevents Tidmore from competing against BP in metro Birmingham. "[I]f an agreement can be implied in cases involving a refusal to deal, there is no reason an agreement cannot be implied in cases involving a horizontal market division." *Hobart*, *supra*, at 900.

In summary, BP could have used the powers vested by the Branded Jobber Agreement to achieve economic efficiencies in distribution and to provide its distributors with a sufficient area to develop profitable markets. BP, however, did not exercise the provision in Tidmore's

Agreement to promote economic efficiencies in the vertical chain of distribution. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), *Continental T.V., Inc. v. GTE Sylvania, Inc., supra.* Rather, BP exercised the provision to allocate territories and customers horizontally between Tidmore and BP, thereby reducing horizontal competition between Tidmore and BP's retail division. BP's purported unilateral refusals to deal (site denial and exclusion of Tidmore from the entire metro Birmingham market) resulted in a restraint of trade which placed it outside the protection of *Colgate*. If BP's exclusion of Tidmore from the metro Birmingham market and the site denials are viewed as a refusal to deal, then such actions are not subject to summary disposition as a simple, or benign, refusal to deal. Rather, BP's actions are subject to review under the Section 1 rule of reason because the refusals implemented a restraint of trade.

Since Tidmore complied with BP's territorial restraint, the case at bar is indistinguishable from *Parke, Davis, Simpson, Perma Life Mufflers, Hobart* or *Eiberger*, where the purported unilateral acts were coupled with or taken to effect a restraint of trade. The Eleventh Circuit attempted to distinguish the instant action from these cases, which set forth the controlling precedent. This effort is almost nonsensical. The court held that "it was the buyer's acquiescence in the unlawful condition — not the mere presence of a contract between the seller and the buyer — that satisfied the Section 1 requirement." 932 F.2d 1389, citing *Simpson, supra*. The court's citation to *Simpson* does not support the conclusion reached. As indicated in *Simpson*, an antitrust defendant may not use an otherwise lawful agreement as an instrument to restrain trade. Contracts which do not openly impose restraints

may nevertheless violate Section 1 if used as a means of restraining trade.[16] *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952). *Noble v. McClatchy Newspapers, supra.* Here, as in *Simpson* and *Perma Life Mufflers*, the contract between seller and buyer supports Section 1 jurisdiction.

CONCLUSION

BP is not the only major oil company interested in expanding its retail operations. Many companies are expanding their direct operations in metropolitan areas to the detriment of their jobbers. Even though such practices may be permitted by contract, if they are found to reduce intrabrand or interbrand competition, they will run afoul of the purpose of Section 1 of the Sherman Act. Under the analysis adopted by the Eleventh Circuit, jobbers, such as Petitioner herein, will encounter great difficulty in obtaining redress from Section 1 violations by their suppliers for several reasons. First, since the restraints are vertically imposed, there generally will not be independent evidence of conspiracy between the supplier and a third party. Thus, the "combination" and

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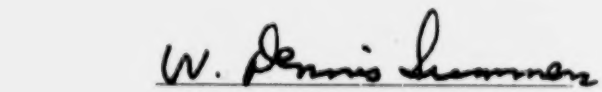
[16]While discussing *Barnosky Oils, supra*, the Eleventh Circuit suggested that BP's denial of Tidmore's site requests were permissible unilateral actions because BP was the owner of the Gulf trademark and logo. BP's use of the density provision to allocate retail markets goes beyond protecting the identity of Gulf products and is solely BP's attempt to restrict Tidmore's market area for its own benefit. Recently, in *Palmer v. BRG of Georgia, Inc.*, ____ U.S. ___, 111 S.Ct. 401 (1990), this Court refused to allow a trademark owner to effect a horizontal territorial allocation under the auspices of a covenant not to compete and exclusive licensing agreement and held that the agreements violated the antitrust laws. Similarly, BP's overreaching under the guise of protecting its trademark is actionable under the Sherman Act. 2 Kinter, *Federal Antitrust Law*, § 10.51 (1980).

"conspiracy" elements of Section 1 will not provide a basis for jurisdiction, and the claimant will depend entirely upon the "contract" element to invoke Section 1 jurisdiction. Second, the Eleventh Circuit effectively has adopted a "contract plus" analysis, which will require plaintiffs to show the existence of a contract plus evidence of conspiracy to support a Section 1 claim. Finally, these cases are generally complex and factually determinative. As a result, confusion reigns in the circuit courts and the district courts concerning application of the terms "contract, combination or conspiracy" in the context of vertical restraint cases.

Respectfully submitted,



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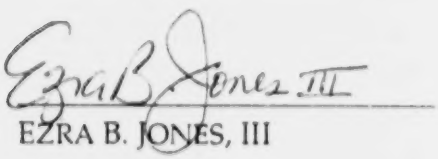

EZRA B. JONES, III

Counsel for Petitioner
Summers & Jones, P.C.
3060 Peachtree Road, N.W.
Suite #1070
Atlanta, Georgia 30305
(404) 233-7274

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 90-7326

TIDMORE OIL COMPANY, INC.,)
Plaintiff-Appellants,)

vs.)

BP OIL COMPANY/GULF
PRODUCTS DIVISION,
A DIVISION OF BP OIL COMPANY)
Defendants-Appellees.)

June 7, 1991.

Before HATCHETT and EDMONDSON, Circuit Judges, and PECKHAM, Senior District Judge.

PECKHAM, Senior District Judge:

Tidmore Oil Company appeals the district court's grant of summary judgment to defendant BP Oil Company. The court granted judgment on Tidmore's first claim (violation of section 1 of the Sherman Act) on the ground that Tidmore had failed to allege the existence of an "agreement" in restraint of trade. The court granted summary judgment on Tidmore's second claim (breach of contract) on the ground that the covenant of good faith and fair dealing, on which Tidmore's claim depended, could not be applied to this contract. We affirm.

I. BACKGROUND

A. *Facts*

Tidmore Oil Company ("Tidmore") is a wholesaler and retail marketer (known as a "jobber") of Gulf-branded petroleum products. Tidmore distributes gasoline wholesale to numerous locations in nine Alabama counties and retails gasoline directly through a smaller number of outlets in the same area.

BP Oil Company/Gulf Products Division ("BP") is a major refiner and retailer of petroleum products. BP markets its products as a dual distributor through jobbers such as Tidmore and directly through its own company-operated outlets.

In early 1985, BP acquired various properties owned by Gulf Oil Company ("Gulf"), including the right to use and license the Gulf logo and trademark in certain parts of the country. At that time, Tidmore's existing contract with Gulf was re-assigned to BP. Under this contract, BP agreed to supply petroleum products to Tidmore and to permit use of the Gulf brand and logo at approved outlets. Tidmore was also required, by the contract, to obtain BP's permission before using the Gulf brand and logo at any new locations:

> **PURCHASER** will not display or permit the display of any Gulf indicia at any location that has not been previously approved in writing by **SELLER** for display of Gulf indicia.

In April 1987, BP and Tidmore entered into a new contract, called the "Branded Jobber Agreement", in which

BP agreed to continue to supply Tidmore with petroleum products. The Agreement reserved to BP the right to determine the use of the Gulf brand.

> 8.b. It is a condition of the foregoing license that Seller [BP] must approve each outlet, whether operated by Buyer [Tidmore] or by Buyer's customers, which shall be identified with the Gulf marks and names. Approval will be based on the appearance, location and mode of operation of the outlet. Seller expressly reserves the right to determine the appropriate geographic density of Gulf branded outlets.

This provision differed from that in the original contract, which had left the approval of Gulf outlets entirely in BP's discretion. The 1987 Agreement also provided for the release of all claims that either party might have had or asserted against the other arising out of or in connection with any prior agreements, except as to claims for indebtedness and claims specifically reserved in writing.

In November 1986, while the first agreement was still in effect, BP rejected Tidmore's request to build a Gulf-branded station near the intersection of Highway 280 and Route 119 in the north Shelby County area. BP failed to state any reasons for the denial. When Joe Tidmore asked Ned Barrett (BP's jobber account representative) to justify the rejection, Barrett allegedly responded, "I don't know Joe. I don't make those decisions. I suppose it's too close to Dewberry." Dewberry was the site of a BP-operated Gulf station approximately 2.6 miles away.

In September 1987, BP approved a market plan that detailed the locations of existing and planned BP-operated

Gulf stations. Between 1987 and 1988, BP undertook to implement that plan by building three new stations in the north Shelby County area, including a station that was closer to Dewberry than Tidmore's planned station would have been. Concerned that BP was encroaching on its traditional market area, Tidmore requested a meeting with BP representatives. In a series of meetings in February and March 1988, Lance Gremillion, BP's Division Manager of Jobber Sales, Taylor Bassett, BP's General Manager for Jobber Sales, and Joe Tidmore discussed Tidmore's concerns, BP's Market Plan, and possible future sites for Tidmore's Gulf stations. Gremillion indicated that BP would not approve Tidmore's proposed sites and then informed Tidmore that BP would not approve any sites within the area defined as "Metro Birmingham".

B. *Procedural History*

Based on BP's refusal to approve new Gulf-branded outlets, Tidmore brought this action on December 22, 1988, alleging violations of section 1 of the Sherman Act, 15 U.S.C. § 1; the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.* ("PMPA"); and the parties' Branded Jobbers Agreement.

In its complaint, Tidmore alleged, *inter alia*, that BP's refusal to authorize use of the Gulf brand imposed non-price horizontal and vertical restraints in violation of the Sherman Act. Tidmore further alleged that BP's actions constituted a bad faith partial termination of a franchise agreement in violation of the PMPA and a breach of the Branded Jobbers Agreement.

The district court, in separate orders, granted summary judgment for defendant on all three causes of action. The first order embraced the claims under the Sherman Act and the PMPA.[1] The district court held that Tidmore had failed to satisfy the elements of a section 1 violation because it had alleged no facts to support an inference of concerted action. In the second order, the court granted judgment for defendant on the breach of contract claim based on its conclusion that the covenant of good faith and fair dealing was not applicable to the Branded Jobbers Agreement.

C. *Standard of Review*

[1-3] This court reviews the district court's grant of summary judgment de novo. *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1492-93 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084, 109 S.Ct. 2110, 104 L.Ed.2d 670 (1989). Summary judgment is appropriate only if the pleadings and evidence in the record demonstrate that there is no genuine issue of material fact as to any issue and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). Although reasonable inferences to be drawn from the facts must be viewed in the light most favorable to the nonmoving party, that party "must present affirmative evidence in order to defeat a properly supported motion for summary judgment" to show that there is a genuine issue for trial. *Anderson*, 477 U.S. at 257, 106 S.Ct. at 2514; *Mat-*

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[1]Tidmore has not appealed the adverse judgment on the claim under the PMPA.

sushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538 (1986). Summary judgment is proper if, after adequate time for discovery, the non-moving party fails to establish the existence of an element essential to its case and on which that party would bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). If there is a complete failure of proof on an essential element, there is no longer a genuine issue of material fact. *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552.

We also note that the Supreme Court has recently endorsed the use of summary judgment in antitrust cases in order to avoid chilling legitimate competitive behavior. *Matsushita*, 475 U.S. at 594, 106 S.Ct. at 1360.

II. THE SHERMAN ACT CLAIM

The first count in Tidmore's complaint alleges that the Branded Jobbers Agreement was a contract in restraint of trade in violation of section 1 of the Sherman Act.[2] The complaint asserts the existence of both horizontal and vertical restraints. Both claims rely on BP's refusal to authorize new retail sites; specifically, the claims focus on BP's refusal to permit the use of the Gulf sign and the Gulf brand at certain proposed locations.

[4,5] In reviewing the grant of summary judgment, we will begin by assuming that BP's refusal to authorize new

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[2]Section 1 of the Sherman Act, in pertinent part, provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

sites limited intrabrand competition in Gulf-branded petroleum products. Section 1, however, does not prohibit **every** act that has the effect of restraining trade. Its scope is more narrow; the Act prohibits only a "contract, combination... or conspiracy in restraint of trade." 15 U.S.C. § 1. Despite the different terminology, there is no magic unique to each term. Courts use the words "contract," "combination", and "conspiracy" interchangeably, and sometimes simply refer instead to an "agreement". 6 P. Areeda, Antitrust Law ¶ 1403 (1978). The first inquiry, in any section 1 claim, then, is to locate the agreement that restrains trade.

[6,7] The classic example of such an agreement is an express conspiracy by competitors to fix prices or allocate territories. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1972). An agreement may also be implied by the conduct of the parties. *American Tobacco Co. v. United States*, 328 U.S. 781, 809, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946). And, because the Supreme Court has rejected the application of the doctrine of **in pari delicto** in antitrust actions, an agreement may be challenged even by one of the parties who has acquiesced in the unlawful agreement. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139, 88 S.Ct. 1981, 1984, 20 L.Ed.2d 982 (1968).

[8] But, regardless of **how** the agreement is formed, the essential fact is that there must be an agreement. The district court properly held that Tidmore failed to satisfy this element. BP, as the licensor of the Gulf brand and logo, is the exclusive owner of the Gulf name in the area. By refusing to authorize Tidmore to use the Gulf name, BP did no

more than exercise its unilateral right to refuse to deal. It is elementary, under the antitrust laws, that a supplier "has the right to deal, or refuse to deal, with whomever it likes as long as it does so independently." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984); *National Indep Theatre Exhibitors, Inc. v. Charter Fin. Group, Inc.*, 747 F.2d 1396, 1402 (11th Cir. 1984), *cert. denied* sub nom., *Patterson v. Charter Fin. Group, Inc.* 471 U.S. 1056, 105 S.Ct. 2120, 85 L.Ed.2d 484 (1985). Contrary to Tidmore's characterization of its position as "an unwilling participant", it was not a participant at all.

The absence of an agreement is strongly suggested by the fact that Tidmore did not, in fact, **agree** to the rejection of the proposed sites. On the contrary, Tidmore lobbied BP for its approval and, failing that, brought this action. Despite the lack of agreement, BP was able to reject the proposed sites and, despite the lack of agreement, BP was able to prevent Tidmore from using the Gulf name at those sites. Tidmore's agreement or acquiescence was not necessary for BP to effect its decisions, nor was such agreement or acquiescence sought by BP. 6 P. Areeda, Antitrust Laws ¶ 1402b4 (1986). Because BP owns the right to use the Gulf logo, it is entitled to decide where, when, and if the name may be used. Its exercise of that right is not a violation of Section 1 of the Sherman Act. *Aquachem Co. v. Olin Co.*, 699 F.2d 516 (11th Cir. 1983) (holding that defendant's unilateral refusal to fill an order is not a violation of Section 1).[3] To find an agreement on these facts would be to find an

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[3]Although a simple refusal to deal fails to state a claim under section 1, such an act could be relevant to a claim under section 2, the monopoly provision. *Mr. Furniture Warehouse, Inc. v. Barclays*

agreement every time a party takes an independent action. This would render the "agreement" element of section 1 a nullity.

This is not to say that all refusals to deal are beyond the reach of the antitrust laws. Courts have found the "agreement" element to be satisfied where a manufacturer uses the threat of termination (1) to coerce retailers to adhere to stated resale prices, *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960), (2) to coerce compliance with a scheme of exclusive territories, Graphic Products Distributors, Inc. v. ITEK Corp., 717 F.2d 1560, 1573 (11th Cir. 1983), (3) to coerce the retailer to refrain from selling competitors products and to comply with certain tying arrangements, *Perma Life*, 392 U.S. 134, 88 S.Ct. 1981, and (4) to obtain the buyer's acquiescence in some other anti-competitive provision, *Eiberger v. Sony Corp. of Am.*, 622 F.2d 1068 (2d Cir. 1980) (creating territorial restrictions by enforcing compliance with warranty fees on products sold outside dealer's territory).

Plaintiff's attempted reliance on these cases, however, is misplaced. In each, the plaintiff alleged more than a simple refusal to deal. Instead, the threat of such a refusal was used to coerce compliance with an unlawful restraint. It was the buyer's acquiescence in the unlawful condition — not the mere presence of a contract between the seller

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American/Commercial, Inc., 919 F.2d 1517, 1522 (11th Cir. 1990). Section 2 proscribes a unilateral refusal to deal "when accompanied by the intent to monopolize and the requisite degree of monopoly power." *Id.* at 1522. Plaintiff, however, has not alleged a section 2 claim, nor, on these facts, does it appear that such a claim could be made.

and the buyer — that satisfied the section 1 requirement. *Simpson v. Union Oil Co. of California*, 377 U.S. 13, 16, 84 S.Ct. 1051, 1054, 12 L.Ed.2d 98 (1964) (indicating that a refusal to deal designed to enforce a resale price maintenance scheme would violate section 1). In this case, although BP chose to permit the use of Gulf signs at some locations and not at others, it sought nothing in return. BP, for example, did not condition approval on Tidmore's compliance with a resale price maintenance scheme, on Tidmore's purchase of other BP products, or on Tidmore's agreement not to deal with BP's competitors. By refusing to deal and seeking nothing in return, BP merely exercised its right, as a licensor, not to approve further use of the Gulf brand.

The Sixth Circuit considered and rejected a similar claim in *Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74 (6th Cir. 1981). In that case, the plaintiff, a petroleum jobber, sued the defendant, Union Oil Company, for violation of section 1 of the Sherman Act. Plaintiff alleged that Union Oil had engaged in horizontal territorial allocations under its Jobber Sales Agreement, which required plaintiff to sell all Union products with Union's name and trademarks and limited use of the Union name to certain preapproved locations. Barnosky argued — as Tidmore urges here — that "the requisite joint action is established in this case because it was forced to comply with a contractual arrangement giving Union exclusive control over the placement of Union signs." *Id.* at 78. The Sixth Circuit found that there was no agreement in restraint of trade.

> The facts alleged by Barnosky preclude a finding that Union engaged in any coercive conduct or that Barnosky in any way participated in the alleged terri-

> torial allocation. By controlling the placement of its signs, Union was merely exercising its right to limit the use of its trade names and trademarks by its customers. Indeed, Union must exercise this control, or risk losing its trademark protection. [citations omitted] In its brief, Barnosky emphasizes the fact that Union's control over sign post placement is evident from the Jobber Sales Agreement and the Loan Agreement, and that Union referred to those documents in exercising that authority. Those facts are not relevant, because Barnosky did not participate in allocating that authority to Union. Barnosky's claim that it unwillingly acquiesced in Union's control over sign placement, and thus participated in a combination, is without merit. Barnosky alleged no facts indicating that its acquiescence in Union's control was needed, sought, or given.

Id. at 78-79.

Tidmore's citation to *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975), does not alter the analysis. In that case, plaintiff, the largest Holiday Inn franchisee, sued Holiday Inns for its failure to approve a proposed site for a franchised hotel. Specifically, plaintiff challenged two provisions of the arrangement: (1) the company-town policy, under which franchisees were barred from competing in towns where company-owned inns are located; and (2) the non-Holiday Inn clause, under which franchisees were prohibited from owning hotels other than those licensed by Holiday Inn. The Third Circuit found that although the company-town policy, standing alone, would be inadequate to evidence an agreement,

the combination of that policy with the non-Holiday Inn clause did suffice. *Id.* at 1253. Taken together, the provisions worked to preclude the franchisees from operating either Holiday Inns or non-Holiday Inns in cities where the defendant operated an Inn. *Id.* at 1254. As a result, plaintiff's acquiescence in the non-Holiday Inn clause converted a permissible company-town policy into an actionable territorial restraint.

Tidmore has made no allegation that it was subject to restrictions similar to the non-Holiday Inn clause. On the contrary, Tidmore has conceded that it was permitted to distribute oil from other suppliers and, indeed, that it could even have purchased oil from BP for sale at the proposed sites — as long as Tidmore did not use the Gulf name. The agreement to allocate territories is thus absent in this case: rather, BP has "merely exercised its unilateral power to deny requests for signs and related equipment." *Barnosky Oils*, 665 F.2d at 80.[4]

III. THE BREACH OF CONTRACT CLAIM

Tidmore alleged that BP refused to approve Tidmore's proposed sites because of BP's desire to expand its own fa-

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[4]In light of our holding that no agreement existed, we need not resolve whether an agreement between Tidmore and BP should be analyzed as a horizontal restraint because BP acts as a dual distributor. It is doubtful, however, that the mere fact that BP acts as both a supplier and a dealer would convert a vertical restraint into a horizontal one. See e.g., *Midwestern Waffles, Inc. v. Waffle House, Inc.* 734 F.2d 705, 720-21 (11th Cir. 1984) (noting trend of courts to view dual distributor and independent franchisee as vertical relationship). See also Department of Justice, Vertical Restraint Guidelines, 50 Fed.Reg. 6263, 6265 (1985) (announcing Department policy).

cilities and to squeeze jobbers (like Tidmore) out of certain areas. In Tidmore's view, BP's rejection constituted a breach of the 1987 Branded Jobbers Agreement under two theories: (1) the rejection was in violation of the express terms of the Agreement, and (2) the rejection constituted a breach of the implied covenant of good faith and fair dealing.

A. *The Branded Jobbers Agreement*

[9] Tidmore argues that BP's refusal to authorize new Gulf-branded sites in 1988 constituted a breach of the 1987 Branded Jobbers Agreement, because the refusal was based on BP's plan to limit Tidmore's ability to compete. The parties agree that, under Paragraph 8.b. of the Agreement, BP was entitled to reject a proposed site for any of four reasons: (a) appearance, (b) location, (c) mode of operation, and (d) density.

> The district court found no evidence to refute BP's contention that its refusal was based on plans to build BP owned and operated stations at or near the sites requested by Tidmore. Although this justification has the obvious effect of limiting Tidmore's ability to compete, that is a power expressly granted to BP by the Agreement:
>
> Seller expressly reserves the right to determine the appropriate geographic density of Gulf branded outlets.[5]

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[5]Although Tidmore is correct in noting that BP stipulated that it "has never said that the decision was based upon density," it would be misleading not to point out that this stipulation referred only to the

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Tidmore thus has no claim that BP breached the express terms of the Agreement.

B. *The Applied Covenant of Good Faith and Fair Dealing*

Tidmore's alternate claim is that BP exercised its discretion under the contract in such a way as to defeat Tidmore's reasonable expectations — a violation of the implied covenant of good faith and fair dealing.

[10] There is a substantial question as to whether the implied covenant provides a basis for a cause of action under Alabama law. In Alabama, the good faith provision of the Uniform Commercial Code, Ala. Code Ann. § 7-1-203, does not create a cause of action either in contract or in tort. *Government Street Lumber Co. v. Am-South Bank, N.A.*, 553 So.2d 68 (Ala. 1989).

The provision is intended to be "directive rather than remedial." *Id.* at 72. Tidmore's claim must then arise, if at all, under the common law.

[11] Although Alabama has recognized that "every contract implies an obligation of good faith and fair dealing," *Hoffman-LaRoche, Inc. v. Campbell*, 512 So.2d 725, 738 (Ala. 1987), it has spoken little about the contours of this obligation. The covenant is designed to "preserve the spirit of the contract rather than the form" and to protect the reasonable expectations of the parties. *Id.* The intent of the covenant is to ensure that "a contracting party shall

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rejection of Tidmore's proposed site in 1986, not to the rejection in 1988. (Joint Statement of Generally Undisputed Facts, R2-56-¶ 15).

not try to deprive the other of the consideration for which he bargained." *Id.*

Tidmore has offered no evidence that BP's conduct deprived Tidmore of the benefit of the bargain. It is undisputed that the Agreement nowhere promised Tidmore that any proposed sites would be approved. Further, Tidmore concedes that it relinquished no rights in accepting the Branded Jobbers Agreement. The Agreement nowhere precluded Tidmore from marketing other brands of gasoline in those same areas. Tidmore's inability to achieve the market dominance it had envisioned does not convert BP's exercise of its rights under a contract into a breach of that contract. See, e.g., *Hubbard Chevrolet Co. v. General Motors Corp.*, 873 F.2d 873, 877-78 (5th Cir. 1989) (applying Michigan law) (holding that the implied covenant has no role in the face of express contract terms); *Davis v. Sears, Roebuck and Co.*, 873 F.2d 888, 895 (6th Cir. 1989) (applying Georgia law) (holding that "there can be no breach of a covenant of good faith where a party to a contract has done what the provisions of the contract expressly give him the right to do"). BP's conduct did not deprive Tidmore of the consideration for which it bargained.

IV. CONCLUSION

Based on the foregoing analysis, we find that the district court correctly granted summary judgment to BP on the antitrust and breach of contract claims. Accordingly, the judgment of the district court is AFFIRMED.[6]

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[6]Tidmore has, in addition, appealed the district court's denial of leave to amend its complaint. This decision is reviewable only for abuse of discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321,

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91 S.Ct. 795, 28 L.Ed.2d 77 (1971). We find that the district court correctly denied the motions on the grounds of futility and undue delay. *Local 472 of United Ass'n of Journeymen and Apprentices v. Georgia Power Co.*, 684 F.2d 721, 724 (11th Cir. 1982).

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

TIDMORE OIL COMPANY, INC., Plaintiff,	)	
vs.	)	CV-88-H-2313-S
BP OIL COMPANY/GULF PRODUCTS DIVISION, Defendant.	)	

ORDER

In accordance with the memorandum of decision this day entered, it is hereby

ORDERED, ADJUDGED and DECREED that defendant's November 17, 1989 motion for summary judgment, as that motion is addressed to the claims embraced in Counts I and II of the complaint, is GRANTED and judgment in favor of the defendant is ENTERED on those claims. The entry of this order does not affect plaintiff's remaining claim for breach of contract stated in Count III.

DONE this _____ day of February, 1990.

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UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

TIDMORE OIL COMPANY, INC.,)
Plaintiff,)

vs.) CV-88-H-2313-S

BP OIL COMPANY/GULF PRODUCTS DIVISION,)
Defendant.)

MEMORANDUM OF DECISION

The court has before it the November 17, 1989 motion for summary judgment of defendant BP oil. The court heard oral argument from the parties on January 23, 1989 and received follow up letter-briefs the week of January 29, 1990. As the court indicated in its order of February 1, 1990, two of the claims raised by the plaintiff in the complaint and addressed by the defendant in its motion have been decided by the court. Specifically the court has decided that as to Count I concerning a violation of 15 U.S.C. § 1 (Sherman Act) and Count II concerning a violation of 15 U.S.C. § 2801 *et seq*, the Petroleum Marketing Practices Act (PMPA) judgment is to be entered for the defendant. As to the third count concerning breach of contract, the court has at this time made no determination as to summary judgment.

The undisputed facts are as follows. The plaintiff Tidmore Oil Company (Tidmore) has been either a distributor or a retail marketer (known as a "jobber") of Gulf Products for approximately twenty-two years. Tidmore be-

came a jobber of Gulf products in 1981 or 1982. Tidmore's principal place of business is Columbiana, Alabama and Tidmore owns or operates Gulf retail establishments in Shelby, Jefferson, Talledega, Coosa, Tallapoosa, St. Clair, Autauga, Elmore and Macon counties. As a jobber Tidmore supplies petroleum products to 45-50 retail locations in Alabama.

On February 1, 1985 BP acquired Gulf properties and the right to use and license the Gulf logo and trademark in certain parts of the country. At that time Tidmore's existing contract with Gulf Oil Corporation was assigned to BP. This contract (contract 1) was entered into in December 1983, became effective on May 29, 1984 and expired by its terms on May 29, 1987.[1] On or about April 22, 1987, Tidmore entered into a new contract (contract 2) called a "Branded Jobber Agreement" with BP.

Contract 2 began on May 29, 1987 and is in force and effect until May 28, 1990.[2]

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[1] The 1983 contract contained the provision;

PURCHASER will not display or permit the display of any Gulf indicia at any location that has not been previously approved in writing by **SELLER** for display of Gulf indicia

[2] The 1987 contract contains the following provision;

8. Tradenames and Trademarks.

a. Buyer shall diligently promote the business and goodwill of the Gulf brand at all times during the term of this Agreement

b. It is a condition of the foregoing license that Seller must approve each outlet, whether operated by Buyer or by Buyer's customers, which shall be identified with the Gulf marks and names. Approval will be

In November of 1986 when contract 1 was still in effect, Joe Tidmore orally requested from Ned Barrett, BP's jobber account representative in the Birmingham area, approval to use the Gulf brand for a new station to be built by Tidmore on Highway 280 in the north Shelby County area. This location was near the intersection of Highway 280 and Route 119, and was approximately 2.6 miles from the nearest Gulf station (a BP operated station on Highway 280 known as Dewberry). Tidmore intended to make this location a Tidmore-supplied dealer operation and estimated that when operational the proposed site would sell around 80,000 gallons of gasoline per month. Lance Gremillion, BP's Division Manager of Jobber Sales for Alabama, testified that he believed that the proposed sight would do 35,000 or 40,000 gallons of gasoline sales per month. Barrett visited the proposed site and prepared a written proposal which was reviewed by Lance Gremillion. Gremillion disapproved the request in December of 1986. The reasons given by BP for the disapproval were that the site would not produce the volume of sales proposed by Tidmore, the site was in an area with restricted visibility from Highway 280, the posted limit on Highway 280 is 55 miles per hour and a large percentage of the traffic on Highway 280 turns off north of the proposed site. At the time of the turndown Joe Tidmore asked Ned Barrett why the site had been dis-

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based on the appearance, location and mode of operation of the outlet. Seller expressly reserves the right to determine the appropriate geographic density of Gulf branded outlets. Seller shall have the right at any time to withdraw its approval of any outlet if such outlet fails to comply with Seller's approval criteria, and in such cases, Buyer shall promptly debrand such outlet and return all identifying and facilities from such outlet to Seller's designated terminal at Buyer's cost.

approved and he allegedly responded, "I don't know, Joe. I don't make those decisions. I suppose it's too close to Dewberry". Barrett denies having made this statement.

At the time of this turndown in December of 1986 contract 1 was in effect. Tidmore did not pursue the matter of the turndown until early 1988 after contract 1 had expired and contract 2 was in effect. As noted earlier, contract 2 became effective on May 29, 1987.

In September 1987, the management of BP formally approved the 1987 Market Plan of BP. The Plan and accompanying map show locations of existing BP stations and also locations where BP has plans to market its products in the future. During 1987 and early 1988, BP constructed and opened three company-operated service stations in the North Shelby County area: near the intersection of Highway 280 and Route 119 (closer to BP's Dewberry site than the site proposed by Tidmore); on Highway 17 near Interstate 65; and near Interstate 65 and Route 119.

At various points in 1987 Joe Tidmore found out about BP's plans to build these new company-operated sites. Tidmore became concerned that his company's traditional area was being encroached upon. In early 1988, Tidmore began to question BP as to the basis for the December 1986 turndown and as to BP's intentions with regard to expansion in the north Shelby County area. A meeting was held at Tidmore's offices in Columbiana on February 2, 1988, with Lance Gremillion and Ned Barrett. A set of questions was posed to Gremillion at that meeting concerning BP's intentions with regard to Tidmore's future ability to be approved for Gulf branding at sites in north Shelby County. These questions were not answered by

Gremillion. A letter dated February 5, 1988 sets forth Gremillion's recollections of the questions asked by Tidmore on February 2, 1988. Taylor Bassett, the recipient of the February 5, 1988 letter from Gremillion, is BP's General Manager for Jobber Sales. Bassett reviewed the questions set forth in the February 5, 1988 letter and discussed them with Peter Riley, BP's regional manager for the retail division of the Birmingham area. The Tidmores and Gremillion met again on March 15, 1988. There is some dispute as to the questions posed by Tidmore and answered by Gremillion at this meeting. Gremillion recalls that he provided Tidmore with BP's 1987 Market Plan, accompanying map and answers to questions previously posed. Joe Tidmore recalls that additional questions that he posed to Gremillion were answered on the spot and that Gremillion indicated that BP would not approve Tidmore's use of Gulf signs at either a Highway 17 location, a Highway 11 location, or a location at the intersection of Highway 52 and I-65, but that Tidmore could rebuild at the intersection of Highway 31 and 119. While there is no evidence that Tidmore ever formalized a request for any of these three locations, Tidmore relies on the 1987 Market Plan and these alleged statements by Gremillion at the March 15, 1988 meeting to support its allegation that BP unlawfully restricted Tidmore's territory.

In June of 1989, Tidmore opened a new Gulf station which it had built on Highway 280 in Chelsea. BP had approved under contract 2, Tidmore's request for this location in October of 1987. Tidmore has never been prohibited by BP from marketing petroleum products under another brand name, nor has BP ever debranded an existing Tidmore location.

Count I of the complaint alleges violations of the Sherman Act. Specifically Tidmore alleges that BP's refusal back in 1986 under contract 1, to approve Tidmore's request for the location on Highway 280 near Route 119, together with BP's indicated disapproval at the March 15, 1988 meeting of three other possible locations, which meet the contract 2 criteria for approval, are unlawful and unjustifiable restraints on trade. Tidmore claims that BP has denied Tidmore the use of the Gulf logo and sale of Gulf products at the new locations in order to reduce competition between Tidmore and BP's company-operated retail locations, effecting an unlawful horizontal allocation of territory in restraint of trade in violation of the Sherman Act.

15 U.S.C. § 1 specifically makes illegal "every contract, combination or conspiracy in restraint of trade". A prerequisite to the analysis of restraint is the finding of a "contract, combination or conspiracy." The standard for the non-moving party to avoid a properly supported motion for summary judgment in an antitrust case was set forth in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d (1984) and was reiterated by the Eleventh Circuit in *Helicopter Support Systems v. Hughes Helicopter*, 818 F.2d 1530 (11th Cir. 1987). Both *Monsanto* and *Hughes Helicopter* involved allegations that a distributor was terminated because it failed to adhere to an illegal resale price agreement. While the present case involves no similar type of agreement the Eleventh Circuit has held that the standard set forth in *Monsanto* is applicable to non-pricefixing cases as well. See *Commuter Transportation Systems v. Hillsborough County*, 801 F.2d 1286 (11th Cir. 1986).

Monsanto requires that in order to avoid summary judgment "[t]here must be evidence that tends to exclude the possibility that the alleged conspirators were acting independently." *Hughes Helicopter,* 818 F.2d at 1533-34 citing *Monsanto,* 465 U.S. at 764.

There must be "direct or circumstantial evidence that reasonably tends to prove that the [parties] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Monsanto,* 465 U.S. at 764 citing *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.,* 637 F.2d 105, 111, *cert. denied,* 451 U.S. 911 (1981). Furthermore, "antitrust law limits the range of permissible inferences from ambiguous evidence in a section 1 case. Indeed, conduct as consistent with illegal conspiracy as with permissible competition does not support an inference of antitrust conspiracy." *Dunnivant v. Bi-State Auto Parts,* 851 F.2d 1575, 1580 (11th.Cir. 1988) citing *Hughes Helicopter,* 818 F.2d at 1533.

The court concludes that the action of BP in the present case involves permissible unilateral action and that the plaintiff has brought forth no specific facts showing that there is a genuine issue for trial. Plaintiff has not shown any evidence of any concerted action on the part of BP and any other jobbers.[3]

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[3] Tidmore has made allegations that there was concerted action based upon the testimony of Lance Gremillion who had final authority to approve or deny a site "unless it's contested." (Deposition of Lance Gremillion, p. 23.). Tidmore relies on this statement and other vague statements to suggest that there was acquiescence by other distributors in the attempted territorial restraints of BP. Such vague statements are insufficient to meet the burden required by *Monsanto,* "to exclude the

Tidmore argues the relevance of *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960) and its progeny[4] to support its position that the contract itself, while entered into voluntarily by Tidmore, violates antitrust because of the unequal bargaining power of BP and Tidmore. Tidmore argues that it was effectively coerced by BP to accept BP's interpretation of the contract and resulting alleged territorial restraints.

In *Barnosky Oils, Inc. v. Union Oil Co. of Calif.*, 665 F.2d 74 (6th Cir. 1981), the Sixth Circuit held that the rationale of *Parke, Davis* did not apply to facts involving no concerted action. The facts of *Barnosky* are strikingly similar to the present case. In *Barnosky*, the plaintiff, a Union Oil jobber, complained that Union's control of the placement of its signs was an unlawful restraint on trade because of the resulting diminution in intrabrand competition. As in this case, Union's right to decide where its signs would be allowed was part of the jobber contract. In affirming the district court's dismissal of the complaint the Sixth Circuit stated that the defendant has "merely exercised its unilateral power to deny requests for signs and related equipment." *Barnosky*, 665 F.2d at 80. Thus, the court went on to say, the facts alleged here" do not fall within any recognized or logical theory of combination." *Barnosky*, 665 F.2d at 79. This court agrees with *Barnosky* and concludes

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possibility that the alleged conspirators acted independently." 465 U.S. at 764.

[4] *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981 (1981); *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869 (1968) and *Simpson v. Union Oil Co. of California*, 377 U.S. 13, 84 S.Ct. 1051 (1964).

that the present case does not present the requisite combination. Therefore, because Tidmore has not met the requisite burden of proof in the face of BP's motion for summary judgment, and because there is no evidence of any concerted action, the court finds that judgment is due to be entered for the defendant as to plaintiff's claim of antitrust violation.[5]

In Count II plaintiff contends that BP has violated the PMPA by restricting Tidmore's marketing area. Clearly in the present case there has been no express termination or non-renewal of Tidmore's franchise agreement with BP. Tidmore requests the court to extend the existing case law on the PMPA by allowing Tidmore to seek redress for a partial termination allegedly the result of BP's failure to approve Tidmore's requested site. With the PMPA "Congress sought to reduce the disparity of bargaining power between the franchisee and the franchisor and prevent the harsh consequences of sudden and unreasonable termination."

Humboldt Oil Co., Inc. v. Exxon Co., U.S.A., 695 F.2d 386 (9th Cir. 1982) (emphasis added). "As remedial legislation, the Act must be given a liberal construction consistent with its goal of protecting franchisees." *Humboldt*, 695 at 389. "Nonetheless, the Act must not be interpreted inconsistently with its plain language and outside its logical boundaries." *Humboldt*, 695 at 389 citing *Kostantas v.*

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[5] Since the court is deciding adversely to plaintiff its claim that the 1986 disapproval under contract 1 violated 15 U.S.C. § 1, it need not decide the effect on that claim of the written release contained in contract 2.

Exxon Co., U.S.A. 663 F.2d 605 606 (5th Cir. 1981), *cert. denied*, 456 U.S. 1009 (1982).

Tidmore contends that BP is attempting to inflict a slow, and painful, termination of Tidmore by eliminating his marketing area in stages. However, Tidmore presents no evidence to support this allegation and this court does not find the facts of this case appropriate for the requested expansion in light of the logical goal of the PMPA to protect franchisees from arbitrary and discriminatory termination or non-renewal. Without the requisite termination or non-renewal the PMPA is simply not implicated.[6] The court therefore finds that there is no genuine issue of material fact as to plaintiff's claimed violation of the PMPA and the defendant is entitled to summary judgment as a matter of law.

For the foregoing reasons, the court is of the opinion that the defendant's motion for summary judgment is due to be granted as to plaintiff's Count I claim for violations of the Sherman Act and as to plaintiff's Count II claim for violation of the PMPA. The court has at this time not decided defendant's motion for summary judgment with regard to plaintiff's Count II claim for breach of contract.

A separate order conforming to this memorandum will be entered contemporaneously herewith.

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[6] BP has further asserted that Tidmore's claim as to a violation of the PMPA is clearly time-barred by the one year statute of limitations contained in the PMPA. Since the court finds that there was no termination or non-renewal, it need not determine the issue of the effect of the statute of limitations.

DONE this _____ day of February, 1990.

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

TIDMORE OIL COMPANY, INC.,)
Plaintiff,)

vs.) CIVIL ACTION FILE CV-88-H-2313-S

BP OIL COMPANY/GULF PRODUCTS DIVISION,)
Defendant.)

AFFIDAVIT OF FRED C. ALLVINE

I, Fred C. Allvine, being duly sworn, on oath, depose and state as follows:

(1) I am a resident of the State of Georgia, and I am over twenty-one years of age. My address is: Georgia Tech College of Management, 755 Ferst Drive, Atlanta, Georgia 30332.

(2) I received an M.B.A. degree from Harvard Business School in 1960 and a B.B.A. degree from Indiana University in 1966.

(3) Since 1972 I have been a Professor of Marketing at the Georgia Institute of Technology. I have co-authored books on the marketing of gasoline, the gasoline crisis; and the state of the economy, as well as numerous articles and monographs for professional marketing journals. I have

also edited several American Marketing Association publications.

(4) In addition to my academic pursuits, I actively provide consulting services to major public and private institutions. I have provided advice to federal and state agencies and the U. 5. Congress (before which I have testified approximately 20 times). I also have worked with executives of major integrated petroleum companies and independent refiners, and have provided consulting services for the top management of a large midwestern food processor, a chain of convenience stores, and a trading stamp company.

(5) I have personally reviewed the retail gasoline market in northern Shelby County, and have observed retail gasoline facilities which are owned or operated by BP Oil Company (Gulf Products Division), Tidmore Oil Company and other competitors located in this market area. My review of the market concentrated on a particular market area which is bounded on the northwest side by Highway 17 (between Highways 31 and 280), on the west by U. S. Highway 31 (between Highways 17 and 119), on the south by State Road 119 (between Highways 31 and 280), and on the northeast by U. 5. Highway 280 (between BP's Dewberry location and Tidmore's proposed 280 site). This market area (hereinafter referred to as the "Affected Market") corresponds with the market area identified in Exhibit 1 of the deposition of Joe Tidmore.

(6) The Affected Market provides a natural market for the sale of retail gasoline because it is bounded on all four sides by major roadways. In addition, the Affected Market is currently the fastest growing area of Shelby County. The

interchanges located at the intersection of the four highways comprising the boundaries of the Affected Area provide access to nearby residential communities for commuters employed in the City of Birmingham. Consequently, a very high percentage of the growth experienced in Shelby County during the last several years has occurred in the Affected Area. The Affected Area may be considered a natural geographical market for the purposes of gasoline retail marketing.

(7) The natural barriers provided by major highways on the borders of the Affected Area, as well as the residential growth which has occurred within the Affected Area, create a market area within which retail gasoline marketers are competing for the same or similar business from commuters and other traffic in the area. Also, competitors within the area tend to price their products based upon competition in the Affected Area, rather than competition from outside the area.

(8) I have reviewed a document identified as Birmingham Trade area 5 by BP Oil Company. From my observation of this document, it is clear that the Affected Area comprises the heart of BP's own Birmingham Trade area 5.

(9) I have reviewed the document identified as Exhibit 1 to the deposition of Joe Tidmore. This document contains a schematic drawing of the Affected Area (at page IA), providing identification of retail gasoline facilities located within the area. It also contains (at page IB) a list of retail gasoline facilities in the area, together with estimates of monthly gallonage provided by Tidmore Oil Company. Pages IA and ID of this document also provide market share information with regard to the retail market share of

BP when compared to all marketers in the area. Based upon my visual observation of the market, and my discussions with Joe Tidmore concerning the market area, I believe that these calculations provide reasonable estimates of the volume and market share prevalent in the Affected Area.

(10) BP Oil currently has four large retail gasoline facilities located within the Affected Area. These facilities are located at the following geographical locations:

(a) Intersection of Interstate 65 and Highway 119;

(b) Highway 17 (Valleydale Road);

(c) Just north of the intersection of Highway 17 and Highway 280 (Dewberry); and

(d) Intersection of Highway 280 and 119.

Based upon BP's own documents provided in discovery, these four locations are selling total gasoline volumes of 625,000 per month. This volume constitutes approximately 37% of the retail gasoline sold in the Affected Area. The competitor with the next highest market share in the area is Shell Oil Company, which has approximately 10% of the retail market share. Tidmore Oil Company has approximately 3% of the retail gasoline market share. In terms of retail gasoline market share, BP's market share of 37% constitutes a very high market share when compared to other comparable retail gasoline market areas.

(11) Tidmore Oil Company has made efforts to increase its market share in the Affected Market, but BP Oil has restricted Tidmore's marketing presence by its refusal

to approve locations for the Gulf sign in the Affected Market Area. This is evidenced by BP's refusal to grant the Gulf sign at Tidmore's proposed site on Highway 280, and also by BP's decision not to approve Gulf signs for Tidmore in other parts of the Affected Area. BP's actions have had the effect of substantially reducing intrabrand competition in the area. Furthermore, BP Oil's market share dominance in the Affected Area has had the effect of reducing interbrand competition.

(12) BP Oil's dominance of the Affected Area, and its actions toward Tidmore have also had the effect of increasing the retail price of gasoline available to consumers in the Affected Area. Generally, BP Oil's retail gasoline facilities price their products one or two cents per gallon higher than the retail prices of unbranded competitors in the Affected Area. Tidmore's company-operated and commission retail facilities located within the Area generally meet the equally low prices of their unbranded competitors located within the Affected Area. Tidmore's prices in the Affected Area are usually one or two cents per gallon below BP's retail prices. Consequently, Tidmore Oil Company represents an important source of competition in the Affected Area. Tidmore's ability to compete effectively and place downward pressure on BP and other competitors in the area has been severely restrained by the actions of BP Oil.

(13) BP has invested large sums of money in its four facilities located within the Affected Area, and these facilities provide state of the art gasoline marketing facilities and equipment. The BP facilities, however, provide only a relatively limited selection of convenience store merchandise.

(14) Tidmore's recently developed company-operated retail facilities (such as the Chelsea location) provide customers with gasoline marketing facilities which are comparable, or superior, to those provided by BP Oil. Tidmore's new facilities, however, provide a much larger selection of convenience store merchandise than that which is made available by BP's retail facilities.

(15) In this market area there is little inter-type competition — private brand versus major oil companies. Inter-type competition has often been very vigorous in offering the public different choices in price and merchandising mix. In the absence of vigorous inter-type competition (majors to private brand price competitors), intra-type competition (competition among major brands — intrabrand competition) becomes very important. One of the major sources of intrabrand competition is the jobber versus the major direct operation stations. In this case, we have an aggressive BP jobber, who often sells at a lower price and offers the public a much bigger assortment of retail goods, being denied the ability to compete in a well-defined market area. As a consequence, the public does not benefit from the price and merchandise competition that Tidmore would have introduced into the market area. This is particularly important since BP is the dominant competitor in the market area with close to a 40% market share. The public is the loser in the decision by BP to prohibit Tidmore from operating in the designated market area. It is understandable why BP would like to deny locations in this area to Tidmore, since BP is the dominant competitor and faces direct price and merchandising competition from a very strong jobber operation.

Further deponent sayeth not.

/s/Fred C. Allvine
FRED C. ALLVINE

Sworn to and subscribed
before me this 22nd day
of December, 1989.

/s/Deborah D. McCurley
Notary Public

My Commission Expires::